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Public Prosecutor v Wanida Chinnabut

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HIGH COURT (SHAH ALAM) — CRIMINAL REVISION NO BA-43–40–10 OF 2023
WENDY OOI JC
5 JANUARY 2024

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Criminal Procedure — Revision — Application for — Sessions court allowed application by defence to be supplied with witness statements recorded under s 112 of Criminal Procedure Code ('CPC') — Whether based on doctrine of stare decisis, court was bound to Federal Court decision and not Court of Appeal decision — Whether witness statements were privileged documents — Whether witness statements ought to be provided to defence via application made under s 51 of CPC

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The accused was charged under s 31(1) of the Child Act 2001 for neglect of a child thus causing him physical injury which eventually led to his death. At the sessions court, the trial judge found that the prosecution had made out a prima facie case against the accused and the accused was ordered to enter her defence in which she did where she appeared as the first defence witness. Prior to the calling of the accused's husband as the second defence witness, the defence applied to be supplied with the statement of the accused's husband recorded under s 112 of the Criminal Procedure Code ('the CPC') as well as transcripts of the interviews with the accused's two children ('the documents'). The learned sessions court judge allowed the application by the defence. Aggrieved, the prosecution filed this application for revision seeking to set aside the order. The issues for determination were: (a) whether based on the doctrine of stare decisis, the court was bound to the Federal Court decision in *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 282 ('Dato' Sri Mohd Najib') and not the Court of Appeal decision in *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46 ('Siti Aisyah'); (b) whether the witness statements were privileged documents; and (c) whether the witness statements ought to be provided to the defence via application made under s 51 of the CPC.

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Held, dismissing the application for revision:

(1) The issue raised and addressed by the Court of Appeal in *Siti Aisyah* was almost similar to the revision at hand. The Court of Appeal in *Siti Aisyah* unanimously allowed the appeal by the defence/appellant and set aside the order of the High Court which dismissed the appellant's application under s 51 of the CPC for the production of seven witness statements recorded under s 112 of the CPC. Thus, by virtue of the doctrine of stare decisis, the court was instead bound by the decision of *Siti Aisyah* and not

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the Federal Court decisions of *Husdi v Public Prosecutor* [1980] 2 MLJ 80 and *Dato' Sri Mohd Najib* (see paras 20–22).

(2) The statements and transcripts requested were from the husband and children of the accused. As such, these statements and transcripts were not made in 'official confidence' but by the coercive process of the law. There was no *quid pro quo* of communicating information on the basis of secrecy and confidence here. Accordingly, there was also no duty to preserve confidence and there could not then be any breach of confidence. There were also no statutory provisions which declared that witness statements shall not be disclosed. Hence, unless there were good reasons for non-disclosure, the prosecution had a duty to disclose and provide the documents sought for by the defence. However, the prosecution did not disclose any good reasons for non-disclosure, instead relied heavily on the argument that it was trite law that witness statements recorded by investigating authorities were privileged documents. As such, there was no merit in the argument raised by the prosecution (see paras 28 & 32–34).

(3) The defence had pinpointed and narrowed down the documents requested. The defence did not go on a frolic of his own by asking from the prosecution whatsoever documents they could lay their hands on. Instead, the documents they requested and sought for were from the three important eyewitnesses. To deny the defence of the documents would be tantamount to disregarding the principle of equality of arms in a criminal proceeding, and ultimately the right to a fair trial. As such, the argument by the prosecution that the defence could always interview the witnesses and that there was no suppression of evidence by the prosecution was without merit. There was a common law duty on the prosecution to disclose to the defence the police statements of the witnesses which were necessary and desirable to their case (see paras 37–40 & 46).

[Bahasa Malaysia summary

Tertuduh didakwa mengikut s 31(1) Akta Kanak-Kanak 2001 kerana mengabaikan kanak-kanak sehingga menyebabkan kecederaan fizikal yang akhirnya membawa kepada kematian. Di mahkamah sesyen, hakim bicara mendapati pihak pendakwaan telah membuktikan kes prima facie terhadap tertuduh dan tertuduh telah diperintahkan untuk membela diri di mana dia hadir sebagai saksi pembelaan pertama. Sebelum memanggil suami tertuduh sebagai saksi pembelaan kedua, pihak pembelaan memohon untuk dibekalkan dengan keterangan suami tertuduh yang direkodkan di bawah s 112 Kanun Tatacara Jenayah ('KTJ') serta transkrip temu bual dengan dua anak tertuduh ('dokumen'). Hakim mahkamah sesyen yang bijaksana membenarkan permohonan oleh pihak pembelaan. Terkilan, pihak pendakwaan memfailkan permohonan ini untuk semakan bagi mengetepikan perintah tersebut. Isu

untuk penentuan adalah: (a) sama ada berdasarkan doktrin stare decisis, mahkamah terikat kepada keputusan Mahkamah Persekutuan dalam *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 282 ('Dato' Sri Mohd Najib') dan bukannya keputusan Mahkamah Rayuan dalam *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46 ('Siti Aisyah'); (b) sama ada kenyataan saksi adalah dokumen terlindung; dan (c) sama ada kenyataan saksi patut diberikan kepada pembelaan melalui permohonan yang dibuat di bawah s 51 KTJ.

Diputuskan, menolak permohonan penyemakan:

(1) Isu yang dibangkitkan dan ditangani oleh Mahkamah Rayuan dalam *Siti Aisyah* hampir serupa dengan semakan yang sedang dijalankan. Mahkamah Rayuan dalam *Siti Aisyah* sebulat suara membenarkan rayuan oleh pihak pembelaan/perayu dan mengetepikan perintah Mahkamah Tinggi yang menolak permohonan perayu di bawah s 51 KTJ untuk dikemukakan tujuh kenyataan saksi yang direkodkan di bawah s 112 KTJ. Oleh itu, berdasarkan doktrin stare decisis, mahkamah sebaliknya terikat dengan keputusan *Siti Aisyah* dan bukannya keputusan Mahkamah Persekutuan *Husdi v Public Prosecutor* [1980] 2 MLJ 80 dan *Dato' Sri Mohd Najib* (lihat perenggan 20–22).

(2) Kenyataan dan transkrip yang diminta adalah daripada suami dan anak-anak tertuduh. Oleh itu, kenyataan dan transkrip ini tidak dibuat dalam 'kepercayaan rasmi' tetapi melalui proses paksaan undang-undang. Tiada *quid pro quo* untuk menyampaikan maklumat berdasarkan kerahsiaan dan kepercayaan di sini. Sehubungan itu, tiada kewajipan untuk mengekalkan kepercayaan dan tidak boleh berlaku sebarang pelanggaran kepercayaan. Juga tiada peruntukan berkanun yang mengisytiharkan bahawa kenyataan saksi tidak boleh didedahkan. Oleh itu, melainkan terdapat sebab yang kukuh untuk tidak mendedahkan, pihak pendakwaan mempunyai kewajipan untuk mendedahkan dan menyediakan dokumen yang diminta oleh pihak pembelaan. Walau bagaimanapun, pihak pendakwaan tidak mendedahkan sebarang alasan kukuh untuk tidak mendedahkan, sebaliknya bergantung kepada hujahan bahawa adalah undang-undang yang mantap bahawa kenyataan saksi yang direkodkan oleh pihak berkuasa penyiasat adalah dokumen terlindung. Oleh yang demikian, tiada merit dalam hujahan yang dibangkitkan oleh pihak pendakwaan (lihat perenggan 28 & 32–34).

(3) Pihak pembelaan telah menunjukkan dan memperincikan dokumen yang diminta. Pihak pembelaan tidak 'go on a frolic of his own' dengan meminta daripada pihak pendakwaan apa sahaja dokumen yang boleh mereka dapatkan. Sebaliknya, dokumen yang mereka minta dan pohon adalah daripada tiga saksi penting. Untuk menafikan pembelaan

dokumen itu sama dengan mengabaikan prinsip 'equality of arms' dalam prosiding jenayah, dan akhirnya hak untuk perbicaraan yang adil. Oleh itu, hujahan oleh pihak pendakwaan bahawa pihak pembelaan sentiasa boleh menemu bual saksi dan tiada penindasan keterangan oleh pihak pendakwaan adalah tanpa merit. Terdapat kewajipan undang-undang biasa ke atas pihak pendakwaan untuk mendedahkan kepada pihak pembelaan kenyataan polis saksi-saksi yang perlu dan wajar untuk kes mereka (lihat perenggan 37–40 & 46).]

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312, FC (refd)
Dato' Sri Mohd Najib bin Hj Abd Razak v PP and another appeal [2023] 1 MLJ 527; [2023] 1 CLJ 672, CA (distd)
Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya [2019] MLJU 282, FC (distd)
Husdi v PP [1979] 2 MLJ 304 (distd)
Husdi v PP [1980] 2 MLJ 80, FC (distd)
PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP [1985] 2 MLJ 436, SC (refd)
R v Brown (Winston) [1998] AC 367, HL (refd)
R v Lawson (1989) 90 Cr App Rep 107, CA (refd)
R v Stinchcombe [1991] 3 SCR 326, SC (refd)
R v Ward [1993] 2 All ER 577, CA (refd)
Siti Aisyah v PP [2019] 4 MLJ 46, CA (folld)
Suruhanjaya Sekuriti v Datuk Ishak bin Ismail [2016] 1 MLJ 733, FC (refd)

Legislation referred to

Child Act 2001 s 31(1)
Criminal Procedure Code ss 51, 112, 112(3), 113(2), (3), (4), (5), 323
Evidence Act 1950 s 32(1)(i), (1)(j), 122, 123, 124, 126, 127, 128, 129
Penal Code

Mohamad Firdaous bin Mohamed Idris (Deputy Public Prosecutor, Selangor State Legal Advisory Chamber) for the appellant.
K Theivaendran (Desmond Ho & Assoc) for the respondent.

Wendy Ooi JC:

INTRODUCTION

[1] An application for revision under s 323 of the Criminal Procedure Code ('the CPC') was made to this court to revise the order of the learned sessions court judge dated 27 October 2023.

[2] In the said order, the learned sessions court judge allowed the application by the defence to be supplied with the statement of Mohd Zarudi bin Mustapha ('the accused's husband') recorded under s 112 of the CPC as well as transcripts of the interviews with the accused's two children, namely NorWadina bt Mohd Zarudi and Nor Wani Sofiya bt Mohd Zarudi ('the documents'). The learned sessions court judge also ordered the documents be supplied by the prosecution to the defence within three days from the date of the said order.

[3] Aggrieved by the said order, the prosecution filed the above said application for revision by virtue of a letter dated 31 October 2023, thus seeking this court to exercise its revisionary powers to set aside the said order.

BACKGROUND

[4] The accused was charged under s 31(1) of the Child Act 2001 for neglect of a child by the name of Izzhan Haris bin Irwan Shafiq thus causing him physical injury which eventually led to his death.

[5] On 26 July 2023, the trial judge found that prosecution has made out a prima facie case against the accused. Accordingly, the accused was ordered to enter her defence in which she did where she appeared as the first defence witness on 22 August 2023.

[6] However, on 10 October 2023, prior to the calling of the accused's husband as the second defence witness, the defence applied for the said witness's statement recorded under s 112 of the CPC. Initially, the prosecution intended to call the accused's husband as one of the witnesses. However, he was not called as a prosecution witness nor offered by the prosecution to the defence at the close of the prosecution stage.

[7] The defence also sought to be supplied with the transcripts of the interviews with the accused's children NorWadina bt Mohd Zarudi and Nor Wani Sofiya bt Mohd Zarudi.

[8] On 27 October 2023, upon hearing the submissions by both the prosecution and the defence, the learned sessions court judge allowed the application by the defence and ordered the documents sought be date of the said order.

FINDINGS BY THIS COURT

[9] In this revision herein, the pertinent issues to be addressed are as follows:

(a) the application of the doctrine of stare decisis;

(b) whether witness statements under s 112 of the CPC ('s 112 statements') are privileged documents? and

(c) whether s 112 statements are to be provided to the defence via application made under s 51 of the CPC?

[10] In respect of these issues, the relevant case laws that come to mind are the often quoted High Court decision in *Husdi v Public Prosecutor* [1979] 2 MLJ 304 Federal Court decisions in *Husdi v Public Prosecutor* [1980] 2 MLJ 80 and *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 282 the Court of Appeal decisions in *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46 and the recent Court of Appeal decision in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and another appeal* [2023] 1 MLJ 527; [2023] 1 CLJ 672.

[11] Understandably, these cases were cited by both the prosecution and defence in their respective submissions in the revision before this court.

DOCTRINE OF STARE DECISIS

[12] Briefly, it was the contention of the prosecution that based on the doctrine of stare decisis, it is the Federal Court decision in *Dato' Sri Mohd Najib* and not the Court of Appeal decision in *Siti Aisyah* that binds this court in respect of the issues raised in the revision herein. As such, the prosecution submitted that the application for the documents by the defence to be dismissed.

[13] However, it is the finding of this court that the cases of *Husdi* as well as both cases of *Dato' Sri Mohd Najib* are distinguished from the revision herein. The distinguishing factor being the aforesaid four cases involved applications by the defence for the production of the s 112 statements prior to the commencement of the trial, iein advance of the trial akin to a pre-trial discovery in a criminal proceeding.

[14] Unlike the cases of *Husdi* and *Dato' Sri Mohd Najib* where the applications for s 112 statements were made prior to the commencement of the trial, the defence in this revision applied for the same at the defence stage.

[15] It was submitted by the defence based on p 2 of the notes of evidence, the witness statement sought for is from the accused's husband whom the prosecution initially intended to call as a prosecution witness. However, the prosecution subsequently decided against it and the accused's husband was also not offered to the defence. Hence, the danger and risk of witness tampering by

the defence no longer becomes an issue since the accused's husband is now the defence witness. And one certainly does not tamper with one's witness. As such, the cases of *Husdi* and *Dato' Sri Mohd Najib* are distinguished on the facts whereupon the decisions made therein do not bind this court.

[16] Furthermore, the Federal Court in both *Husdi* and *Dato' Sri Mohd Najib* had the opportunity to hold the denial of such applications to apply across the board regardless of whether the application were made prior to or during the commencement of the trial or even at the defence stage. Yet in both cases, the Federal Court chose not to do so.

[17] In fact, the Federal Court in *Dato' Sri Mohd Najib* could have set aside the Court of Appeal decision in *Siti Aisyah*, yet once again it chose not to do so.

[18] As such, it can be inferred that the decisions made by the Federal Court in both the cases only meant for applications made prior to the commencement of the trial. Hence, the fear and risk in the tampering of witnesses by the defence as noted by the Federal Court is clearly justified.

[19] That being said, such risk and fear are no longer present once the defence calls a witness which was initially intended to be a prosecution witness. The same person notwithstanding was once a potential prosecution witness is now a witness for the defence. As stated earlier, one certainly does not tamper with one's own witness.

[20] Conversely, similar to the facts leading to the revision herein is the case of *Siti Aisyah*. In fact, the issue raised and addressed by the Court of Appeal in *Siti Aisyah* is also almost similar to the revision at hand. The issue being — whether the prosecution can be ordered, at the end of the case for the prosecution, and where defence has been called, to furnish to the accused a copy of witness statements recorded under s 112 of the CPC of witnesses offered to the defence which are material and which may assist the defence case.

[21] The Court of Appeal in *Siti Aisyah* unanimously allowed the appeal by the defence/appellant and set aside the order of the High Court which dismissed the appellant's application under s 51 of the CPC for the production of seven witness statements recorded under s 112 of the CPC.

[22] Thus, by virtue of the doctrine of *stare decisis,* this court is instead bound by the decision of *Siti Aisyah* and not the Federal Court decisions in *Husdi* and *Dato' Sri Mohd Najib.*

A PRIVILEGED DOCUMENTS

[23] The prosecution also referred to the Federal Court decision in *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733 in his argument on the application of s 124 of the EA 1950 to s 112 statements.

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[24] Coincidentally, the case of *Suruhanjaya Sekuriti* and the argument on the application of s 124 of the EA 1950 to s 112 statements were also raised and argued by the prosecution in *Siti Aisyah.* It was contended by the prosecution that the Federal Court in *Datuk Eshak* considered the s 112 statements were protected from disclosure under s 124 of the EA 1950.

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[25] On this note, the Court of Appeal in *Siti Aisyah* distinguished the case of *Datuk Eshak* as follows:

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> [79] The distinguishing factor, in our view, was that disclosure there was sought for civil proceedings and, unlike the instant case, the Federal Court relied heavily on the contents of an affidavit filed by the investigating officer of the appellant before concluding that the statements were recorded in official confidence and that disclosure was not in the public interest.

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[26] Accordingly, this court adopts the findings of the Court of Appeal in *Siti Aisyah* in distinguishing the case of *Datuk Ishak* in this revision herein.

[27] Further, as held by the Court of Appeal in *Siti Aisyah*, s 124 of the EA 1950 does not apply to the police statements in question as they were not communications made to a public officer in 'official confidence'. The privilege under s 124 of the EA 1950 is analogous to information provided by informers, for example, where there is a confiding of secrets followed by a corresponding promise of secrecy.

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[28] Conversely, the statements and transcripts requested in the revision herein are from the husband and children of the accused. As such, these statements and transcripts are not made in 'official confidence' but by the coercive process of the law. There is no *quid pro quo* of communicating information on the basis of secrecy and confidence here. Accordingly, there was also no duty to preserve confidence and there cannot then be any breach of confidence.

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[29] The Court of Appeal in *Siti Aisyah* also disagreed with *Husdi* that police statements are absolutely privileged based on the following findings:

(a) under s 112(3) of the CPC, the person giving a police statement 'shall be legally bound to state the truth'. If the police statement is found to be false, its maker can be charged for giving false evidence under the Penal

Code and its maker cannot claim that the communication between him and the police officer is privileged and therefore not admissible in evidence;

(b) there are no statutory provisions which allow for disclosure of police statements, there are also no provisions which declare that such police statements shall not be disclosed. Unlike documents evidencing affairs of state (s 123 of the EA 1950), for official communications (s 124 of the EA 1950), communications during marriage or marital privilege (s 122 of the EA 1950), and professional communications between an advocate and his client or legal professional privilege (ss 126–129 of the EA 1950) where these provisions prevent the relevant parties from being compelled to disclose such communications to anyone including the court except as provided;

(c) the fact that paras s 32(1)(i) and (j) of the EA 1950 are to be independent of each other and to be read disjunctively resulting in the admissibility of statements which fall within the four categories of persons mentioned therein; and

(d) statutory law allows such s 112 statements to be admitted in evidence in certain circumstances. For example, s 113(2) of the CPC provides that the court can intervene and order production of s 112 statements for the purposes of challenging and impeaching the credit of witnesses. Similarly, s 113(3), (4) and (5) of the CPC allows s 112 statement be admitted in evidence under the said subsections.

[30] Notwithstanding the Court of Appeal in *Dato' Sri Mohd Najib* are privileged documents, they are however, not absolutely privileged based on the abovesaid reasons stated in *Siti Aisyah.*

[31] The Court of Appeal in *Dato' Sri Mohd Najib* also acknowledged that there are no statutory provisions which give the right to inspect such statements. Hence, the reason for not disclosing was to avoid the real clanger of tampering with witnesses.

[32] Accordingly, as held by the Court of Appeal in *Siti Aisyah*, there are also no statutory provisions which declare that such police statements shall not be disclosed. For instance, unlike the Evidence Act 1950 ('the EA 1950') which provides certain types of communication, statements as privileged, ie statements evidencing state of affairs (s 123 of the EA 1950), official communications (s 124 EA 1950), marital privilege (s 122 of the EA 1950) and legal professional privilege under s 126 of the EA 1950.

[33] Hence, unless there are good reasons for non-disclosure, the prosecution have a duty to disclose and provide the documents sought for by

the defence in the case for this revision herein. However, the prosecution did not disclose any good reasons for non-disclosure, instead relied heavily on the argument that it is trite law witness statements recorded by investigating authorities are privileged documents.

[34] Be that as it may, the analysis and findings of this court on privileged documents and absolutely privileged documents are as abovementioned. As such, this court finds no merit in the argument raised by the prosecution.

SECTION 51 OF THE CPC

[35] The next question for this court to consider was whether the defence had fulfilled the dual requirements of necessity and desirability under s 51 of the CPC. Section 51 of the CPC states as follows:

> 51 Summons to produce document or other things
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> (1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order
>
> (2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.
>
> (3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

[36] The application under s 51 of the CPC and the principles related thereto, namely, the requirements of 'necessary or desirable' were clearly laid down in the Federal Court decisions in *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 and *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312. In short, the dual requirements of necessity and desirability were aimed to eliminate the roving or fishing expedition by the defence in asking for documents in the general sense.

[37] By comparison, the defence herein has pinpointed and narrowed down the documents requested (ie the s 112 statement of the accused's husband as

well as the video interview transcripts of the accused's two children). It was submitted by the defence based on p 191 of the notes of evidence, that the father of the deceased victim testified these three persons (ie the accused's husband and two children) were in the house at the time of the incident which led to the charge in question. The presence of these three persons were further supported by the evidence of the investigating officer as submitted by the defence based on pp 243–244 of the notes of evidence.

[38] Hence, the defence clearly did not go on a frolic of his own by asking Instead, the documents they requested and sought for were from these three important eye-witnesses. Undeniably, their statements would be of great importance and assistance to the defence case. Even more so, when the incident happened almost four years ago and to recollect what had happened that day may not be as easy as it seems.

[39] Thus, to deny the defence of the said documents would tantamount to disregarding the principle of equality of arms in a criminal proceeding, and ultimately the right to a fair trial.

[40] As such, this court finds the argument by the prosecution that the defence could always interview the witnesses (ie the accused's husband and two children) and that there was no suppression of evidence by the prosecution is without merit.

[41] Reference is made to the much quoted judgment of Parker LJ in *R v Lawson*:

> ... It should be borne in mind, however, that an inflexible approach to these circumstances can work injustice. *For example, the witness' memory may have faded when the defence eventually seek to interview him. Or he may refuse to make any further statement* The better practice is to allow the defence to see such statements unless there is good reason for not doing so. (Emphasis added.)

As well as the judgment of Harmindar Singh JCA in *Siti Aisyah*:

> [83] Also, without the witness statements, the defence would run the risk of impeachment of such witnesses by the prosecution through the use of the police statements in their custody. This would certainly offend the equality of arms principle and the jurisprudence that has spawned from it.

[42] Ultimately, it all boils down to the element of fairness in a trial to both the prosecution and defence (ie equality of arms principle). The English common law clearly laid down the principles that unless there are good reasons for non-disclosure, the prosecution have a duty to disclose and provide, from the unused material, witness statements to the defence (see *R v Lawson* (1989)

90 Cr App Rep 107; *R v Ward* [1993] 2 All ER 577 and *R v Brown (Winston)* [1998] AC 367 which were referred to in *Siti Aisyah*).

[43] Echoing the Supreme Court of Canada decision in *R v Stinchcombe* [1991] 3 SCR 326 where it was recognised that '... the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done' (per Sopinka J at p 333).

[44] *R v Stinchcombe* was also referred in *Siti Aisyah* where in line therein, it was held by the Court of Appeal

> [68] Simply put, the duty of the prosecution is to act fairly. They are certainly not obliged to lead evidence which may undermine their case, but fairness requires the unused material in its possession, which may undermine its case, or be helpful to its adversary, be disclosed to the defence. *The duty as a prosecutor should never be one bent on securing a conviction at all costs thus risking injustice.* (Emphasis added.)

[45] Thus, unless and until the decision in *Siti Aisyah* is set aside by the Federal Court or by a later Court of Appeal which decision differs from that of *Siti Aisyah*, the Court of Appeal decision in *Siti Aisyah* is still good law in respect of application for s 112 statements of witnesses at the defence stage.

[46] Accordingly, bound by the decision in *Siti Aisyah*, this court finds there is a common law duty on the prosecution to disclose to the defence the police statements of the witnesses which were necessary and desirable to their case.

CONCLUSION

[47] After having carefully considered the submissions by both parties, this court finds no plausible reason to disturb the order granted by the learned sessions court judge. The application for revision is hereby dismissed for lack of merit.

Application for revision dismissed.

Reported by Ahmad Ismail